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IN THE

Supreme Court of the United States

October Term, 1970.

No. 608

LEO F. BAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

B. NATHANIEL RICHTER,
121 South Broad Street—5th Floor,
Philadelphia, Pa. 19107
Counsel for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX.

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	4
Statement of the Case	6
Reasons for Granting the Writ	13
1. This Court Should Exercise Its Power of Supervision to Correct the Lower Court's Refusal to Consider the Uncontradicted Evidence Which Revealed That the Shipowner Knew of the Shipyard-Contractor's Negligence, Had the Power to Control the Shipyard and the Work Being Done on Its Vessel and Had a Non-Delegable and Continuing Duty to Provide a Safe Place to Work	13
2. The Decision Below Conflicts With Other Decisions of This Court and With Decisions of Other Courts of Appeals	17
Conclusion	23
Appendixs	
District Court Judgment	A1
District Court Findings of Fact and Conclusions of Law	A2
District Court Order	A7
Court of Appeals Opinion	A8
Court of Appeals Judgment	A17

TABLE OF CITATIONS.

Cases: Page

Albanese v. N. V. Nederl Amerik Stoomv. Maats, 382 U. S. 283 (1965) 16, 17, 21

Aldridge v. States Marine Corporation of Delaware, 265 F. 2d 544 (C. A. 9, 1959) 16, 17, 22

Bolam v. Louisville & N. R. Co., 295 F. 2d 809 (C. A. 6, 1961) 15

Browning v. Crouse, 356 F. 2d 178 (C. A. 10, 1966) 14

Burns v. Fisher, 132 Mont. 26, 313 P. 2d 1044, 67 A. L. R. 2d 1 (1957) 14

Casbon v. Stockard Steamship Corp., 173 F. Supp. 845 (E. D. La., 1959) 16

Dressel v. Parr Cement Co., 80 Cal. App. 2d 536, 181 P. 2d 962 (1947) 15

Emelwon, Inc. v. United States, 391 F. 2d 9 (C. A. 5, 1968) .. 15

Ercoli v. U. S., 131 F. 2d 354 (C. A. D. C., 1942) 15

Filipek v. Moore-McCormack Lines, Inc., 258 F. 2d 734 (C. A. 2, 1958) 17, 19, 20, 21

Gallagher v. United States, 206 F. 2d 177 (C. A. 2, 1953) .. 20, 21, 22

George v. Capitol Traction Co., 295 F. 965 (C. A. D. C., 1924) . 14

Halecki v. United N. Y. & N. J. Sandy Hook Pilots Ass'n., 302 F. 2d 840 (C. A. 2, 1962) 16, 21

Hercules Power Co. v. Costa, 289 F. 2d 571 (C. A. 5, 1961) .. 15

Hodge v. United States, M. D., Ga. 1969, — F. Supp. — [No. 2238, Feb., 1969], aff'd — F. 2d — 20

Ira v. Bushey & Sons, Inc. v. United States, 398 F. 2d 167 (C. A. 2, 1968) 20

Jamison v. A. M. Byers Co., 330 F. 2d 657 (C. A. 3, 1964) 15

Jones v. Raney Chevrolet Co., 217 N. C. 693, 9 S. E. 2d 395 (1940) 15

Kanopka v. Kanopka, 113 Conn. 30, 154 A. 144, 80 ALR 619 (1931) 15

Kansas Transport Co. v. Browning, 219 F. 2d 890 (C. A. 10, 1955) 15

Kelly v. Jackson, 6 Pet. 622, 8 L. Ed. 523 (1832) 13

Kermarec v. Compagnie Generale Transatlantique, 358 U. S. 625 (1959) 17, 20

TABLE OF CITATIONS (Continued).

Cases (Continued):

	Page
Kirk v. United States, 270 F. 2d 110 (C. A. 9, 1959)	20
Kissinger v. United States, 176 F. Supp. 828 (E. D. N. Y. 1958)	16
Kuhn v. P. J. Carlin Constr. Co., Inc., 154 Misc. 892, 278 N. Y. C. 635 (1935)	17
La Capria v. Compagnie Maritime Belge, 286 F. Supp. 980 (S. D. N. Y., 1968)	16
Lettsome v. United States, 411 F. 2d 917 (C. A. 5, 1969)	16, 19
Market Ins. Co. v. Killon, — F. 2d — (C. A. 5, 1969) [No. 26, 410, Sept. 8, 1969]	20
Mendoza v. A/S J. Ludwig Mowinckels Rederi, 293 F. Supp. 1319 (S. D. N. Y., 1968)	16
Moragne v. States Marine Lines, Inc., 38 L. W. 4498 (S. Ct., 1970)	23
Nicholas v. Davis, 204 F. 2d 200 (C. A. 10, 1953)	14
Peairs v. Florida Pub. Co., 132 So. 2d 561 (Fla., 1961)	15
Pekelis v. Transcontinental & Western Air, 187 F. 2d 122 (C. A. 2, 1951)	15
Pope & Talbot, Inc. v. Hawn, 346 U. S. 406 (1953)	20
Potucek v. Cordelería Lourdes, 310 F. 2d 527 (C. A. 10, 1962) certiorari denied 372 U. S. 930	14
Quinones v. Twp. of Upper Moreland, 293 F. 2d 237 (C. A. 3, 1961)	15
Roberson v. United States, 382 F. 2d 714 (C. A. 9, 1967)	10, 20
Sealock v. Hockley, 186 Md. 49, 45 A. 2d 744 (1946)	15
Security Nat. Bank v. Johnson, 195 Okla. 107, 155 P. 2d 249	15
Schoenbaechler v. Louisville Taxicab & T. Co., 328 S. W. 2d 514 (Ky., 1959)	15
Spinozzi v. E. J. Lavino & Company, 243 F. 2d 80 (C. A. 3, 1957)	15
Stark v. United States, 413 F. 2d 253 (C. A. 5, 1969)	19
Stone v. Stone, 136 F. 2d 761 (C. A. D. C., 1943)	14
Taylor v. Jacobson, 336 Mass. 709, 147 N. E. 2d 770 (1958)	15
The Sea Gull, 21 Fed. Cas. 909, 921 (No. 12,578) (C. C. D. Md., 1867)	23

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

United N. Y. & N. J. Sandy Hook Pilots Ass'n. v. Malecki, 358 U. S. 613 (1959) 16, 17, 20
United States v. Page, 350 F. 2d 28 (C. A. 10, 1965) 20
Van Horn v. Gulf Atlantic Towing Corp., 388 F. 2d 626 (1968) 17, 19
West v. United States, 361 U. S. 118 (1959) 3, 13, 17, 18, 19, 21
White v. United States, 400 F. 2d 74 (1968) 17, 19
Zamora v. Thompson, 250 S. W. 2d 626 (Tex. Civ. App., 1952) 15

Authorities:

Anno., 80 ALR 624 15
Anno., 169 ALR 790 15
Restatement, Torts, § 344, Comment b 15
Wigmore, Evidence (3d Ed. and 1964 Pocket Supp.) §§ 1069, 1078 15
Wigmore, Evidence (3d Ed. and 1964 Pocket Supplement) § 2504a 15

Statutes:

Longshoremen's and Harbor Workers' Compensation Act, § 41, 33 U. S. C. § 941 18
Public Vessels Act, 46 U. S. C. § 781 2

United States Code:

Title 28:
§ 1254(1) 2
§ 1346 ..... 2, 4, 10, 12
§ 2674 ..... 2, 5, 10, 12
Title 46:
§ 781 4

U. S. Constitution:

Amendment V 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No.

LEO F. BAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioner Leo F. Baum respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 2, 1970.

OPINION BELOW.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Findings of Fact and Conclusions of Law, the Order Denying Plaintiff's Motion to Amend and Supplement the Findings of Fact and Conclusions of Law, and the Judgment of the United States District Court for the Middle District of Florida-Jacksonville Division also appear in the Appendix hereto. They are not reported.

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 2, 1970. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Does the Public Vessels Act, 46 U. S. C. § 781, and federal maritime law, or does the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b) and 2674, and the law of the place where wrongful act or omission occurred, determine the liability and duties of the United States as a shipowner for the negligence of its marine surveyor where he had actual knowledge that the shipyard-contractor was using obviously dangerous makeshift hoisting containers to lift debris from the hold of the government's vessel and failed to exercise his authority and powers to forbid the dangerous practice or to require the shipyard-contractor to use safe hoisting containers or to erect reasonable safeguards to protect other workers from falling containers although he had ample opportunity to do so prior to petitioner's accident?

2. Does the United States as a shipowner owe a duty to provide a safe place to work for shipyard workers aboard its vessel while in a floating drydock on a navigable river, especially where its agent aboard the vessel knows that the shipyard contractor is performing contracted work upon the vessel with obviously dangerous makeshift tools or equipment and that agent has full authority to compel the shipyard to use safe methods and equipment and to exercise care so as to provide the shipyard workers on the vessel with a safe place to work?

3. Did the Court of Appeals err in enlarging the application of *West v. United States*, 361 U. S. 118 (1959) to relieve shipowners from their continuing duty to exercise reasonable care to provide a safe place to work for employees of shipyard-contractors aboard their ships in cases where the employee was *not* injured by the very item the contractor was hired to repair but was injured by the contractor's unnecessary use of dangerous makeshift tools with the shipowner's knowledge and implicit consent.

4. Has petitioner, a permanently totally disabled shipyard worker, been deprived of his right to recover without due process of law in violation of the Fifth Amendment where the Court of Appeals sustained the District Court's adverse decision only by declaring that there was no evidence that defendant's marine surveyor had knowledge of any dangerous defect, when in fact the record was redundant with clear, uncontradicted admissions that the surveyor knew, prior to petitioner's accident that the independent contractor's employees were using flimsy discarded paint cans as hoisting containers, one of which ultimately caused petitioner's injuries?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States of America, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 46:

> § 781. Libel in admiralty against or impleader of United States
>
> A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920. Mar. 3, 1925, c. 428, § 1, 43 Stat. 1112.

United States Code, Title 28:

> § 1346. United States as defendant
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United

States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

STATEMENT OF THE CASE.

The jurisdiction of the District Court was invoked because the defendant was the United States of America and the plaintiff's cause of action was based upon the Public Vessels Act and Suits in Admiralty Act.

Leo F. Baum, petitioner, was a 44 year old shipyard machinist who was permanently and totally disabled by an accident on January 10, 1967 while working aboard the S. S. Cape San Martin, a vessel owned by the United States Maritime Administration which was undergoing extensive repairs in a floating drydock upon the St. John's River at the Jacksonville Shipyards, Jacksonville, Florida, incidental to reactivation from the moth ball fleet (A. 284). A separate crew of workmen of Jacksonville Shipyards, Inc. were hoisting debris from the hold of this vessel near the spot where Baum was required to work (A. 187, 160-164). They were using discarded five-gallon paint cans with flimsy wire handles as hoisting containers (A. 82-83, 89, 95, 161, 165-166, 179-180, 187-190, 192-193, 212). The accident occurred when the wire handle of a can pulled out of its sockets on the sides of the can and the can, loaded with debris, dropped ten to fifteen feet and struck Baum's head (A. 194).

Jackson B. Springs was the United States Maritime Administration's marine surveyor[1] aboard the ship whose job was to supervise the performance of the contract of repair by Baum's employer, Jacksonville Shipyards, Inc. (A. 57, 102, 285). He was on the S. S. Cape San Martin

1. The word "surveyor" in this context is equivalent to "superintendent; overseer, supervisor, or the like". Webster's New International Dictionary (2d Ed., 1950).

about eight hours every day that the work was being performed and went wherever work was being done on the ship (A. 74-82, 107). In his testimony, he admitted that prior to Baum's accident, he knew that the clean-up crews of the shipyard were using discarded paint cans to haul debris from the hold (A. 82-84, 89, 123). Other witnesses testified that there had been prior incidents of cans dropping because of handles pulling out of the sides of such cans (A. 187-188) and that the shipyard workers had been complaining about this use of these paint cans for a period of three years before Baum's accident to their supervisors (A. 198-200, 209-210) and to the International Brotherhood of Boilermakers, Iron Ship Builders, etc., AFL-CIO (A. 231-235, 241-242, 244). Springs necessarily knew then of this danger. He knew that in this trade hoisting containers were generally used for this shipboard work which were constructed with heavier handles and were more securely fastened to the bucket (A. 91-92). But he failed to fulfill his duties. Although he recognized that he was required to be aboard the ship to supervise the shipyard's performance of the contract and that he was required to enforce every provision thereof, he concerned himself only with preserving the safety of the ship, not the safety of the shipyard workers upon the ship (A. 115, 118). But, when confronted with Article 9[2] of the contract, he conceded that he should have required the shipyard to comply with that provision of the contract, also (A. 121).

Furthermore, the government had admitted in its answers to plaintiff's interrogatories that its surveyor was

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2. ARTICLE 9. *Indemnity and Insurance:*

(a) *The Contractor shall exercise reasonable care and use its best efforts to prevent accidents, injury or damage to all employees,* persons and property in and about the work, and to the vessel or portion thereof upon which work is done. (Supp. A. 20).

required to ensure that the contractor discharged his responsibilities for the safety of the workers under Article 4 of the contract of repair.[3] In those same answers, the United States admitted that its surveyor had the authority "to deal with the contractor's supervisor" when departures from the responsibilities placed upon the contractor by Article 4 were noted and Springs, in his testimony, ad-

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3. Defendant's Answer to Plaintiff's Interrogatory No. 8 (Supp. A. 1, 34). The contract provided:

ARTICLE 4. *Workmanship and Inspection:*

(a) Unless otherwise specifically provided in the job order *all workmanship, equipment, materials and articles, and all operational practices of the Contractor* used in the performance of the work, shall be the best commercial marine practice and shall be of a suitable grade of their respective kinds. All work performed by the Contractor shall comply with the requirements of the American Bureau of Shipping, the United States Coast Guard, and other regulatory bodies in accordance with the rules of said regulatory bodies. (Supp. A. 18)

(c) During the Contractor's performance thereof, the work shall be subject to inspection and test by the authorized representative of the [Director, National Shipping] Authority at any and all times and places, and any part of the work may be rejected by said representative of the Authority if not as specified or because of defective workmanship or materials. Any portion of the work so rejected shall forthwith be replaced or corrected by the Contractor at its own cost and expense. (Supp. A. 12, 19)

(d) At the request of the authorized representative of the [Director, National Shipping] Authority the Contractor shall place *reasonable safeguards* and shall put and keep at all time sufficient lights *to prevent accidents in spaces and areas in which the Contractor will be required to perform or has started work* and to provide safe access and egress to and from the vessel. (Supp. A. 12, 20)

(k) The United States shall have the right at any time and from time to time to furnish materials, supplies, tools, equipment, plans, drawings, and facilities or services (except services which the Contractor itself is ready, able and willing to furnish) for use upon or in connection with work under a job order under this contract, and title [*sic*] thereto shall at all times remain in the United States. (Supp. A. 22)

mitted that he had full authority to enforce the safety requirements of the contract (A. 102-106).[4] Yet, Springs did not stop the shipyard when it used discarded paint cans for hoisting, (A. 103); nor did he demand the erection of safeguards, such as simple sheets of plywood as ceilings to protect the workers below (A. 104-105). He did nothing, although he had ample authority and power under the contract and the duty to render the ship a safe place to work. He knew of this use of dangerous tools and equipment, and had ample opportunity to exercise his authority and power prior to Baum's accident, but neglected to do so (A. 102-104).

All of the foregoing uncontradicted admissions of the government and its marine surveyor were admitted in evidence at the trial before the District Court (A. 279-282). Nevertheless, the District Court ignored these

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4 Defendant's Answer to Plaintiff's Interrogatory No. 9 (Supp. A. 1, 4). Also, the contract provided:

ARTICLE 26. *Default:*

(a) The United States may, subject to the provisions of paragraph (b) below, by written Notice of Default to the Contractor, terminate the whole or any part of the work covered by a job order in any one of the following circumstances:

* * *

(2) If the Contractor fails to perform *any of the other provisions of this contract* or the job order issued hereunder, or so fails to make progress as to endanger performance of the job order in accordance with its terms. (Supp. A. 40)

ARTICLE 27. *Disputes:*

All disputes concerning questions of fact or of interpretations which may arise under any job order, and under this contract, which are not disposed of by mutual agreement, shall be decided by the authorized representative of the [Director, National Shipping] Authority who shall reduce his decision to writing and mail a copy to the Contractor at its regular place of business. (Supp. A. 12, 42) (Emphases supplied.)

crucial facts[5] and entered judgment against petitioner. It gratuitously declared that the "Good Samaritan Rule", a theory which none of the parties had advanced or argued, was not applicable to this case. The District Court cited and followed *Roberson v. United States*, 382 F. 2d 714 (C. A. 9, 1967), a case under the Federal Tort Claims Act which none of the parties had cited. *The determinative effect of the admissions of knowledge on the part of the defendant's surveyor were ignored by the trial judge* (A. 395-401, 417-418). Therefore, petitioner filed a motion asking the District Court to take cognizance of those admissions and to amend and supplement the Court's findings of fact and conclusions of law and to vacate its judgment in favor of the defendant.[6] The motion was summarily denied upon briefs without argument and judgment was entered in favor of the United States as defendant against petitioner, and as third-party plaintiff against Jacksonville Shipyards, Inc., third-party defendant, for indemnification of counsel fees. There was no action or proceeding between plaintiff and Jacksonville Shipyards, Inc. (A. 349-356, 14-15).

Petitioner then appealed to the Court of Appeals. That Court agreed that the *Roberson* decision did not "squarely answer the questions presented in the case at bar".[7] The Court held that the fact that "the property owned by the government here is a sea-going vessel does

5. At trial, the Court's attention had been directed to the subject admissions by the defendant in plaintiff's trial brief, at pp. 2, 6, 8, 10 and 12. In addition, plaintiff called these admissions to the trial court's attention in argument upon defendant's motion for dismissal, (A. 293-294), plaintiff's motion for a directed verdict on liability, (A. 347-348), and in his summation, (A. 365-367).

6. Plaintiff's Motion, paragraphs 5 and 10. (A. 407-408, 414-415).

7. Page 6 of the opinion.

not differentiate this case from similar cases under the Federal Tort Claims Act",[8] nor did the fact that this action was brought under the Suits in Admiralty Act and the Public Vessels Act, "and their concomitant admiralty law". In this we respectfully submit the Court committed grave fundamental error.

While the Court of Appeals conceded that even under the law of Florida there was an exception to the general rule which would have permitted petitioner to recover, it declared that the essential fact which would have supported application of that exception to this case, namely, knowledge of the marine surveyor of the dangerous conditions, was not in evidence here.[9] Thus, the Court of Appeals closed its eyes to the admitted facts of this case and ignored petitioner's basic assignment of error on the part of the District Court, namely, its failure to amend its findings of fact and conclusions of law pursuant to plaintiff's motion to reflect the admissions of knowledge of the government's surveyor of the use of dangerous makeshift tools or equipment for an ample time prior to petitioner's accident. Yet, the presence of these admissions in the evidence was set forth at pages 7, 15 and 18 of petitioner's brief, as well as in the transcript of the trial and plaintiff's motion for

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8. Page 7 of the opinion.

9. Specifically, the opinion reads as follows at p. 7:

> Nor does the relationship between the parties here (contractee-contractor) give rise to the imposition of a duty on the Government. It is well settled "that a contractee is generally not liable for the torts of an independent contractor or of the latter's servants". *Roberson, supra; Kirk, supra;* 41 Am. Jur. 2d, *Independent Contractors*, § 24 (1968).[3]

3. An exception to this general rule rises, of course, when the contractor has knowledge of a dangerous condition created by the independent contractor. *Emelcon, Inc. v. United States*, 5 Cir., 1968, 391 F. 2d 9. *However, there is no evidence here that the government inspector had knowledge of any dangerous defect.* [Italics supplied]

amendment of the findings of fact which had been included in the appendix thereto. There were also references to these admissions in the brief of Jacksonville Shipyards, Inc.[10] There is no ascertainable excuse for the erroneous conclusion of the Court of Appeals that these facts were not present in this case. Having read these admitted facts out of the record, the Court of Appeals affirmed the judgment of the District Court on June 2, 1970.

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10. At pages 2-3, 5, 14 and 19 of that brief.

REASONS FOR GRANTING THE WRIT.

1. This Court Should Exercise Its Power of Supervision to Correct the Lower Court's Refusal to Consider the Uncontradicted Evidence Which Revealed That the Shipowner Knew of the Shipyard-Contractor's Negligence, Had the Power to Control the Shipyard and the Work Being Done on Its Vessel and Had a Non-Delegable and Continuing Duty to Provide a Safe Place to Work.

In *West v. United States*, 361 U. S. 118 (1959), this court recognized that there is a duty to furnish a safe place to work which is non-delegable on the part of a shipowner where he has the power either to supervise or to control the repair work in which an employee of a contractor is engaged. In this case, the evidence is uncontradicted that this was so. Nonetheless, the learned trial judge and the Court of Appeals ignored reams of uncontradicted testimony and admissions to that effect and stated that the government representative on the vessel had no power of control over the work. The effect of this ruling is that it deprived the petitioner of his right to recover in violation of due process of law.

In *Kelly v. Jackson*, 6 Pet. 622, 632, 8 L. Ed. 523 (1832), this court declared that unrebutted *prima facie* evidence could not be disregarded:

> "What is prima facie evidence of a fact? It is such as in judgment of law, is sufficient to establish the fact: and, if not rebutted, remains sufficient for the purpose. The jury is bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would

hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregard it. It would be error on their part, which would require the remedial interposition of the court. In a legal sense, then, such prima facie evidence in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such we understand to be the clear principles of law on this subject."[11]

Here, the marine surveyor assigned by the United States Maritime Administration to the S. S. Cape San Martin as the defendant's authorized representative under the contract during the period of the repairs testified that he knew, prior to petitioner's accident, that the shipyard was using makeshift hoisting containers of flimsy construction aboard the vessel. He admitted that he had the power and authority to forbid their use. His testimony was not denied, contradicted, rebutted nor explained away. The testimony pertained to knowledge he acquired while acting within the course and scope of his authority and employ-

11. See also, *Browning v. Crouse*, 356 F. 2d 178, 180 (C. A. 10, 1966); *Potucek v. Cordeleria Lourdes*, 310 F. 2d 527, 531 (C. A. 10, 1962) certiorari denied 372 U. S. 930; *Burns v. Fisher*, 152 Mont. 26, 313 P. 2d 1044, 67 A. L. R. 2d 1 (1957); *Nicholas v. Davis*, 204 F. 2d 200, 202 (C. A. 10, 1953); *Stone v. Stone*, 136 F. 2d 761, 764 (C. A. D. C. 1943). In *George v. Capitol Traction Co.*, 295 F. 965, 968 (C. A. D. C. 1924), the court said: "But where the testimony is all one way, and is not immaterial, irrelevant, improbable, inconsistent, contradicted, or discredited, such testimony cannot be disregarded or ignored by judge or jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results, for which the verdict or decision, if reviewable, must be set aside. To hold otherwise would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen. Kelly v. Jackson, 6 Pet. 622, 631, 8 L. Ed. 523."

ment.[12] The defendant did not object to its admission in evidence (A. 279-280). Therefore, the surveyor's testimony was the equivalent of judicial admissions conclusively establishing the facts admitted.[13] Yet, in the face of these admissions, the Court of Appeals declared that in this record there was "*no evidence*" that the marine surveyor of the defendant had knowledge of any dangerous defect or condition created by the independent contractor, and therefore refused to apply its decision in *Emelwon, Inc. v. United States*, 391 F. 2d 9 (C. A. 5, 1968) to petitioner's case, thereby precluding his recovery. Yet, because of the admissions of knowledge on the part of the defendant's surveyor, petitioner's case was squarely within the *Emelwon* exception to the general rule.[14] Furthermore, under the federal maritime law, which should have governed the decision of this case, actual or constructive knowledge of the

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12. Wigmore, Evidence (3d Ed. and 1964 Pocket Supp.) §§ 1069, 1078; *Cf. Pekellis v. Transcontinental & Western Air*, 187 F. 2d 122, 128-129 (C. A. 2, 1951); *Dressel v. Parr Cement Co.*, 80 Cal. App. 2d 536, 181 P. 2d 962 (1947); *Jones v. Raney Chevrolet Co.*, 217 N. C. 693, 9 S. E. 2d 395 (1940).

13. *Cf. Hercules Power Co. v. Costa*, 289 F. 2d 571 (C. A. 5, 1961) (knowledge admitted); *Bolam v. Louisville & N. R. Co.*, 295 F. 2d 809, 811-812 (C. A. 6, 1961); *Kansas Transport Co. v. Browning*, 219 F. 2d 890 (C. A. 10, 1955); *Ercoli v. U. S.*, 131 F. 2d 354, 357 (C. A. D. C., 1942); *Schoenbaechler v. Louisville Taxicab & T. Co.*, 328 S. W. 2d 514 (Ky., 1959) (pre-trial deposition testimony of plaintiff held judicial admission of contributory negligence); *Taylor v. Jacobson*, 336 Mass. 709, 147 N. E. 2d 770, 775 (1958) (admission of knowledge); *Zamora v. Thompson*, 250 S. W. 2d 626, 628 (Tex. Civ. App., 1952) (admission of knowledge); *Scalock v. Hockley*, 186 Md. 49, 45 A. 2d 744, 746 (1946); Wigmore, Evidence (3d Ed. and 1964 Pocket Supplement) § 2594a; *Security Nat. Bank v. Johnson*, 195 Okla. 107, 155 P. 2d 249, 169 ALR 790 and Anno., 169 ALR 798; *Kanopka v. Kanopka*, 113 Conn. 30, 154 A. 144, 80 ALR 619 (1931) and Anno., 80 ALR 624.

14. See, also, *Pears v. Florida Publ. Co.*, 132 So. 2d 561 (Fla., 1961); *Jamison v. A. M. Byers Co.*, 330 F. 2d 657 (C. A. 3, 1964); *Quinones v. Twp. of Upper Moreland*, 293 F. 2d 237 (C. A. 3, 1961); *Spinozzi v. E. J. Lavino & Company*, 243 F. 2d 80 (C. A. 3, 1957); Restatement, Torts, § 344, Comment *b*.

shipowner of facts which made its ship an unsafe place to work was the cornerstone upon which liability was founded in *Albanese v. N. V. Nederl Amerik Stoomv. Maats*, 382 U. S. 283 (1965) and *United N. Y. & N. J. Sandy Hook Pilots Ass'n. v. Halecki*, 358 U. S. 613, 618-619 (1959) and many other cases.[15] *A fortiori*, the Court of Appeals should have reversed the judgment and orders of the District Court in light of the actual facts of this case. But, because of their failure to take cognizance of those facts, both the District Court and the Court of Appeals failed to deal with the issue before them, and thereby deprived petitioner of his cause of action without due process of law. It is imperative that this Court issue certiorari in exercise of its powers of supervision to prevent such a manifest miscarriage of justice.

In this case, the lower court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise by this court of its power of supervision to prevent a deprivation of petitioner's property without due process of law.

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15. *Halecki v. United N. Y. & N. J. Sandy Hook Pilots Ass'n.*, 302 F. 2d 840, 841 (C. A. 2, 1962) (carbon tetrachloride was known to be dangerous); *Lettsome v. United States*, 411 F. 2d 917 (C. A. 5, 1969); *Aldridge v. States Marine Corporation of Delaware*, 265 F. 2d 554, 557 (C. A. 9, 1959); *La Capria v. Compagnie Maritime Belge*, 286 F. Supp. 980 (S. D. N. Y., 1968) (defendant had actual knowledge or ample time to observe dangerous practice); *Mendoza v. A/S J. Ludwig Mowinckels Rederi*, 293 F. Supp. 1319, 1322 (S. D. N. Y., 1968); *Casbon v. Stockard Steamship Corp.*, 173 F. Supp. 845, 847 (E. D. La., 1959) ("respondent was, or should have been, aware of the practice"), at p. 849 ("Long-accepted practices are very often unsafe practices which are discontinued only after their character as such has been demonstrated by accidents"); *Kissinger v. United States*, 176 F. Supp. 828, 833 (E. D. N. Y., 1958) ("a hazard of which the Master must or should have had knowledge").

2. The Decision Below Conflicts With Other Decisions of This Court and With Decisions of Other Courts of Appeals.

The Fifth Circuit refused to apply the federal maritime principle that a shipowner is under a continuing duty to provide the employees of its independent contractor with a safe place to work.[16] Instead, it enlarged the exception to that duty announced in *West v. United States*, 361 U. S. 118 (1969) to include its erroneous conception of the facts of petitioner's case. In *West*, a repairman was injured by a metal plug which blew off of a water line. The defective water line and plug had been listed in the specifications of his employer's repair contract for repairing and replacement. This Court said, at p. 193:

> "It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe. The respondent * * * was under no duty to protect petitioner from risks which were inherent in the carrying out of the contract." [17]

Here, the shipowner's surveyor had actual knowledge of the patently dangerous practice. The use of flimsy paint cans was not compelled by the nature of the work contracted

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16. *Albanese v. N. V. Nederl Amerik. Stoom v. Maats*, 382 U. S. 283 (1965); *United N. Y. & N. J. Sandy Hook Pilots Ass'n. v. Halecki*, 358 U. S. 613, 618-619 (1959); *Kermarec v. Compagnie Generale Transatlantique*, 358 U. S. 625 (1959); *White v. United States*, 400 F. 2d 74, 76 (1968); *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F. 2d 636, 639 (1968); *Aldridge v. States Marine Corporation of Delaware*, 265 F. 2d 554, 577 (C. A. 9, 1959); *Kuhn v. P. J. Carlin Constr. Co., Inc.*, 134 Misc. 892, 278 N. Y. C. 635 (1935).

17. The opinion cites *Filipek v. Moore-McCormack Lines, Inc.*, 258 F. 2d 734 (C. A. 2, 1958).

to be done. Here, the admitted function of the government's marine surveyor was to affirmatively supervise the work and to enforce the contract of repair, which included his duty to ensure that the contractor discharged its responsibilities under Article 4 of the contract for the safety of the workers, as admitted in Defendant's Answer to Plaintiff's Interrogatory No. 8 (Supp. A. 1, 4) and its surveyor's testimony (A. 102-106, 121). It is utterly unrealistic as well as contrary to the government's admissions and the contract itself to assert that the government's representative lacked the right and the power to forbid the dangerous practice and to require safer equipment or safeguards.[18] Yet, the lower court declared, at p. 10 of its opinion:

> "The record indicates that the Government had relinquished control of the vessel. The Government was not in control of the work area, the manner of detail performance, nor safety procedures, and it was not a duty of the single inspector on board to take control of same."

The Court below refused to accept the fact that petitioner had *not* been injured by the very defect which the shipyard had been hired to repair as a ground for distinguishing his case from the *West* decision. It said, at p. 9 of its opinion:

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18. Not only did the marine surveyor and the U. S. Maritime Administration have the power to require safe tools and equipment under the contract and to stop the work, if necessary, but Congress had charged the Department of Labor with the responsibility of enforcing § 41 of the Longshoremen's and Harbor Workers' Compensation Act, which requires employers to provide safe places to work "with particular reference to equipment used by and working conditions established by such employers" and had given it full power to do so through injunctions and criminal sanctions. 33 U. S. C. § 941. Therefore, the government had powers not available to the ordinary private shipowner, if it wished to invoke them.

> "Whether the actual injury is caused by the object being repaired or by other work being done in the vicinity is not cause for distinction where the risk is equally present in both situations. In both, the repair work creates the unsafe condition."

It failed to appreciate that petitioner's injuries were not caused "by other work being done in the vicinity" but by the unnecessarily dangerous implements which the shipowner knew were being used to do that work. The repair work contracted for did not create the unsafe condition—the long-continued known dangerous practice of hoisting debris in discarded paint cans did.

The Fifth Circuit's enlargement of the *West* exception to include extraordinary dangers unnecessary to performance of the repair contract conflicts with the Fourth Circuit decisions in *White v. United States*, 400 F. 2d 74, 76 (1968) and *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F. 2d 636, 639 (1968) which limited *West* to its special facts and seemingly departs from its own prior analysis of *West* in its decision in *Stark v. United States*, 413 F. 2d 253, 254 (C. A. 5, 1969).[19]

In *Van Horn*, the Fourth Circuit stated the duty of a shipowner, as follows, at 388 F. 2d 638:

> "On the basis of *Kermarec* and *Halecki*, we hold that federal maritime law, which of course governs this tort action that arose on navigable waters, requires that a shipowner *who delivers his vessel to drydock* exercise due care under all the circumstances to provide a reasonably safe place to work for those who foresee-

19. *Cf. Lettsome v. United States*, 411 F. 2d 917, 922 (C. A. 5, 1969) citing *Filipek*, but not *West*. The Fourth Circuit's decisions appear to be correct, because in *West* this Court relied upon the *Filipek* case where the Second Circuit had also found the same exception to the subject rule, limited to the situation where the very item being repaired created the danger.

ably will come aboard to service the vessel. See Olah v. The S. S. Juladurga, 343 F. 2d 457 (4th Cir. 1965); see also Norris, The Law of Maritime Personal Injuries, § 38 (1959).[20] [Italics supplied.]

The Fifth Circuit, however, held that there was no difference between the duties imposed by state law upon owners of property and the duties imposed by federal maritime law upon shipowners. Opinion, p. 7. It then relied upon Federal Tort Claims Act decisions,[21] to support its conclusion that the shipowner here did not owe a duty to petitioner to provide him with a safe place to work.[22] These

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20. *Kermarec v. Compagnie Generale Transatlantique*, 358 U. S. 625 (1959); *United N. Y. & N. J. Sandy Hook Pilots Ass'n. v. Halecki*, 358 U. S. 613, 618-619 (1959); *Pope & Talbot, Inc. v. Hazen*, 346 U. S. 406 (1953); *Cf. Ira S. Bushey & Sons, Inc. v. United States*, 398 F. 2d 167 (C. A. 2, 1968).

21. *Roberson v. United States*, 382 F. 2d 714 (C. A. 9, 1967); *United States v. Page*, 350 F. 2d 28 (C. A. 10, 1965); *Kirk v. United States*, 270 F. 2d 110 (C. A. 9, 1959); *Hodge v. United States*, M. D. Ga. 1969, — F. Supp. — [No. 2238, Feb., 1969], aff'd — F. 2d —; *Market Ins. Co. v. Killon*, — F. 2d — (C. A. 5, 1969) [No. 26, 410, Sept. 8, 1969]. The foregoing decisions in which the plaintiff sought to impose liability upon the government because of inadequate inspection and supervision pursuant to its contract rights are irrelevant to this case because here the government's supervisor admitted that he knew of the practice which caused the injury for a substantial period of time prior to the injury. The maritime cases of *Filipek v. Moore-McCormack Lines, Inc.*, 258 F. 2d 734, 736-737 (C. A. 2, 1958) and *Gallagher v. United States*, 206 F. 2d 177 (C. A. 2, 1953) were also cited, but should have been distinguished from the present case as indicated in the text, *infra*.

22. In *Kermarec, supra*, this court said "For the admiralty law at this late date to import such conceptual distinctions [of the common law] would be foreign to its traditions of simplicity and practicality. The Lottawanna, 21 Wall. 558, at page 575, 22 L. Ed. 654. The incorporation of such concepts appears particularly unwarranted when it is remembered that they originated under a legal system in which status depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system in that respect entirely alien to the law of the sea. We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests, the duty of exercising reasonable care under the circumstances of each case." 358 U. S. 625, 630.

cases are not in accord with maritime law and the two maritime cases cited are distinguishable from the present case. In *Filipek*, the shipowner was absolved because there was insufficient evidence as to whether it was chargeable with knowledge of a latent defect which a reasonable inspection would not show and, as in the *West* case, the injury there was caused during the testing operation by the very object the contractor was hired to test. Similarly, in *Gallagher*, it does not appear that the shipowner had knowledge of the dangerous practice of the stevedore and it was *stipulated* by the parties that the shipowner did not supervise the stevedoring activities.

As a result of its analysis of the Federal Tort Claims Act decisions, the Fifth Circuit stated that the circumstances of this case did not give rise to the imposition upon the United States of a duty toward plaintiff as an employee of its independent contractor. It said, at pages 6-7 of its opinion:

> "In reaching this conclusion, the following relevant factors are considered, seriatim: what law is applicable; the relationship between the parties; the terms of the contract; the acts of the parties regardless of the contract; who had control of the vessel, the work area, and the safety program; the nature of the risk involved; and when was the risk created."

The most important factor was not among the factors listed—to wit, the shipowner's actual knowledge of the inadequate and dangerous instrumentality. This omission conflicts with this Court's holding in *Albanese*,[23] where constructive knowledge as opposed to actual knowledge was held sufficient to impose such a duty, and *Halecki*,[24] where

23. *Supra*, p. 14.

24. *Supra*, p. 14, footnote 15. Its decision also conflicted with the other decisions cited in footnote 15.

common knowledge that carbon tetrachloride was dangerous to human life was held to give rise to the duty. This portion of the Court's decision also conflicts with the decision of the Ninth Circuit in *Aldridge v. State Marine Corporation of Delaware*, 265 F. 2d 554, 556-557 (C. A. 9, 1959), which reversed the lower court's dismissal of the plaintiff's complaint in an action based upon negligence only, citing *Halecki* and stating:

> "Had the facts here been developed through a pre-trial conference, or on trial, the degree of knowledge which the ship's officers had, after they refused further to furnish the carpenter and his hammers, that a less safe method was in use, would have been made apparent for evaluation by the judge and jury."

A shipowner possessing knowledge of its contractor's dangerous methods and practices and having sufficient opportunity and power to prevent their use should be held liable to the contractor's employees who may be injured by such practices if the shipowner fails to exercise its right and powers to eliminate the danger.

As the Second Circuit said in *Gallagher*, at p. 179:

> "Where power is reserved by one who has hired an independent contractor to direct or control the contractor, an affirmative duty arises to exercise that power with reasonable care. Restatement, Torts § 414. The duty is co-extensive with the power."

Reservation of the right and power to control the contractor is equivalent to reservation of control over the ship. When such power is coupled with actual knowledge of the danger in time to avoid accidents, the shipowner also has control over the circumstances. The law should motivate shipowners to exercise control over their contractors to prevent

accidents from known dangerous practices by the imposition of a duty commensurate with their contractual powers. Such a duty promotes safety on ships—limiting responsibility to the contractor alone correspondingly limits the promotion of safety. The imposition of such a duty is consonant with "the humane and liberal character of proceedings in admiralty to give than to withhold the remedy when not required to withhold it by established and inflexible rules." *The Sea Gull*, 21 Fed. Cas. 909, 921 (No. 12,578) (C. C. D. Md., 1867), quoted in *Moragne v. States Marine Lines, Inc.*, 38 L. W. 4498 at 4502 (S. Ct., 1970).

It is respectfully submitted that this Court is justified in granting certiorari to resolve and clarify the maritime law governing the circumstances of this case, in addition to rectifying the injustice petitioner has suffered by reason of the errors of the lower courts.

CONCLUSION.

In this case, as distinguished from *West*, the evidence was overwhelming that the United States did have control or the right to control the operations of the shipyard-contractor and the ship during the repair work and, therefore, was under a duty to exercise reasonable care to provide the shipyard workers with a safe place to work. Even if this were not so, the Court of Appeals conceded that if the government's marine surveyor had knowledge of the dangerous conditions created by the dangerous practices of the contractor, then the United States would be liable to petitioner for such negligence of its contractor. However, the Court of Appeals misread the record in this case and mistakenly concluded there was no evidence of such knowledge. In this, it was grossly in error *quod erat demonstrandum*.

Therefore, this court should issue a writ of certiorari in exercise of its general powers of supervision over admiralty law to prevent the permeation of incorrect principles of law and the unjust application of such errors of law to the facts of this case.

Respectfully submitted,

B. Nathaniel Richter,
121 South Broad Street—5th Floor,
Philadelphia, Pa. 19107,
Counsel for Petitioner.